Supreme Court, U.S.
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No. 04-138

IN THE

Supreme Court of the United States

LIFE INVESTORS INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

LAJUAN C. JOHNSON and STEVEN JOHNSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did the Tenth Circuit, in this diversity action, properly interpret Utah law in determining that the insured's accidental death was covered by the terms of the insurer's accidental death insurance policy?

Did the Tenth Circuit, in this diversity action, properly interpret Utah law in determining that the beneficiaries under the first party insurance policy are entitled to an award of attorney fees as consequential damages for the insurer's breach of the express terms of the insurance contract?

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STATEMENT OF THE CASE

A. Background

The decedent, Marvin Johnson ("Mr. Johnson"), was diagnosed with myotonic dystrophy in 1974, at age 42. Although he developed muscle weakness and other symptoms as a result of the myotonic dystrophy, he remained active. (Aplt. App. 180)[1] Mr. Johnson worked at hard physical labor in his burial vault business until he retired in 1991. It is not typical for patients with myotonic dystrophy to die at an unusually young age. While their life expectancy might be a little less than the average non-dystrophic, there is not a significant difference. Myotonic dystrophy patients do not die of this disease; they typically die of the same causes as other people. [Depo of Dr. Stanchfield, pp. 21-22 (Aplt. App. 51); Aff. of Lajuan Johnson, & 2 (Aplee. Supp. App. 40)]

Mr. Johnson also remained quite active after his retirement, and was fully able to perform normal life functions up until the time of his accident in 1995. He cared for himself, including bathing, dressing and cooking meals. He used a stationary bike and a treadmill. He was responsible for household work, including much of the laundry and all of the yard work, both mowing the lawn in the summer and shoveling snow in the winter. Any problem he had with his grip did not interfere with his day to day activities. [Depo of Lajuan Johnson, pp. 31, 38,

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1. The citations to the record on appeal before the Tenth Circuit are to the Appellant's Appendix ("Aplt. App.") filed by petitioner Life Investors Insurance Company of America ("Life Investors") pursuant to *10th Cir. R.* 30.1, and the Appellees' Supplemental Appendix ("Aplee. Supp. App.") filed by respondents Lajuan C. and Steven Johnson pursuant to *10th Cir. R.* 30.2.

41, 68-69, 78-79 (Aplt. App. 70, 72, 79, 80, 82); Depo of Vicki Dorius, pp. 23-24 (Aplee. Supp. App. 26-27)]

Mr. Johnson was active in other ways as well. He would play ball with his grandchildren and swim once or twice with them every summer. He never missed a University of Utah basketball game. [Depo of Lajuan Johnson, p. 33 (Aplt. App. 71); Depo of Vicki Dorius, pp. 23-24 (Aplee. Supp. App. 26-27)]

Mr. Johnson walked frequently, sometimes even long distances, without mishap. He walked up and down staircases daily more than once a day without accident or injury (with one exception discussed below) up until the day of his accident. When he attended a University of Utah basketball game, he walked from the parking lot to the Huntsman Center arena. He walked up and down stairs to his seat in the Huntsman Center without ever falling. Even in 1995, the year of his death, he would walk down the stairs in the Huntsman Center, and then walk halfway around the concourse to get to his seat. On one occasion in January, 1995, his daughter parked a long distance away from the arena and he walked a great distance from the parking spot to the arena. [Depo of Lajuan Johnson, pp. 33, 40, 50 (Aplt. App. 71, 72, 75); Depo of Vicki Dorius, pp. 19-20 (Aplee. Supp. App. 24-25); Aff. of Lajuan Johnson, ¶¶ 3-4 (Aplee. Supp. App. 40)]

The television that Mr. Johnson typically watched was located in the downstairs area of the Johnsons' home. Until his death, Mr. Johnson walked up and down the same stairs on which he had his fatal accident, on a daily basis, often carrying dishes. He did this day after day without injury whatsoever, except for one occasion four years before his death when he fell forward down the stairs, resulting in minor injury. [Depo of Lajuan

Johnson, pp. 49-50, 52 (Aplt. App. 75); Aff. of Lajuan Johnson, ¶¶ 3-4 (Aplee. Supp. App. 40)]

Although on some occasions when he had gotten out of his rocking chair and tried to step forward, Mr. Johnson had gone down on all fours, he had never, to the knowledge of Mrs. Johnson, fallen backwards on stairs or elsewhere. [Aff. of Lajuan Johnson, && 4-5 (Aplee. Supp. App. 40-41); Depo of Lajuan Johnson, p. 63 (Aplt. App. 78)] Between November of 1993 and July 1995, Mr. Johnson had no acute illness or injuries, and sought no medical care except for the periodic dilation of his esophagus required by his hiatal hernia. His family did not notice any worsening of his condition. [Depo of Lajuan Johnson, pp. 67-70 (Aplt. App. 79, 80); Depo of Virginia Johnson, pp. 16-18 (Aplee. Supp. App. 30-32)]

Mr. Johnson described to his son Steven the July 29, 1995 fall that led to Mr. Johnson's death. Mr. Johnson said that he had made his dinner for the evening and had walked downstairs with his dishes on a tray. He watched a game or a movie. Afterwards, he was going back up the stairs carrying the dishes. He got almost to the top of the stairs and put one of his feet on the next step, but the foot wasn't stable enough on the step. When he lifted his other foot up he ended up slipping and falling, tumbling backwards.[2] [Depo of Steven Johnson, p. 21 (Aplee. Supp. App. 37)]

The fall fractured Mr. Johnson's neck, requiring him to be immobilized in the hospital, which resulted in pneumonia. Because of the neck fracture, the doctors could not effectively

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2. Contrary to Life Investors Petition for Writ of Certiorari ("Petition") at p. 2, there is no evidence in the record that Mr. Johnson's fall was caused by a "dizzy spell."

treat the pneumonia, and he died in the hospital four days after the fall. (Aplt. App. 180)

Dr. Campbell, who signed the death certificate,[3] was not qualified to give an opinion about the cause of Mr. Johnson's accident. Dr. Campbell is a pulmonologist who only treated Mr. Johnson during the last two days of his life, and admitted that he had no expertise in myotonic dystrophy, and that a neurologist would have the most expertise regarding myotonic dystrophy. [Depo of Campbell, pp. 39-40, 71 (Aplt. App. 114, 122)] In the opinion of Dr. Reichert, plaintiffs' expert neurologist, ". . . it is not possible to say with reasonable medical probability that myotonic dystrophy caused Mr. Johnson's fall on his stairs on July 29, 1995 . . ." People without this disease have falls under similar circumstances. [Reichert Aff. ¶¶ 4-5 (Aplee. Supp. App. 43)]

B. Policy Provisions

The benefit provisions of the Certificate of Group Insurance ("Insurance Certificate") issued to Mr. Johnson state as follows:

> **Loss of Life Indemnity Benefit:** If, as a result of Injury, a Covered Person dies within 120 days from the date of the accident which caused the Injury and the accident occurs while the person is insured under this Benefit, then we will pay the Loss of Life Indemnity which is shown in the Data Page as applicable to such Person.

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3. The death certificate is referred to in the Tenth Circuit Order and Judgment ("Opinion") that is the subject of the Petition [Appendix ("App.") 1 to Petition, p. 3a.]

Accident Hospital Indemnify Benefit: We will pay a daily benefit when a Covered Person is confined to a hospital while under the care of a Physician, but only if such Period of Confinement:

1. is necessary for the treatment of Injury which results from an accident which occurs while the person is insured under this Benefit; and

2. begins within 120 days from the date of such accident; and

3. begins while the person is insured under this Benefit.

. . . .

Aplt. App. 138.

The amount of the loss of life benefit is two hundred thousand dollars ($200,000.00), and the amount of the hospitalization benefit is two hundred dollars ($200.00) per day and two hundred fifty dollars ($250.00) per day for intensive care.[4] (Aplt. App. 137)

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4. Mr. Johnson was hospitalized for four (4) days before his death, two (2) days of which were in intensive care, as a result of his accidental injuries.

The following are the provisions in the Insurance Certificate upon which Life Investors relies in denying coverage:

Definitions

. . . .

"Injury" means bodily injury of a Covered Person which:

1. is caused by an accident which occurs when the Covered Person's insurance is in force under the Policy; and

2. results in loss insured by the Policy; and

3. creates loss due, directly and independently of all other causes, to such accidental bodily injury.

. . . .

(Aplt. App. 136)

General Exclusions

. . . .

The Policy does not insure for any loss resulting from any Injury caused or contributed to by, or as a consequence of . . .

. . . .

> 3. any sickness or infirmity unless the treatment of such is required as the direct result of an accidental bodily injury . . .

(Aplt. App. 139)[5]

REASONS FOR DENYING THE PETITION

I. THE PETITION SEEKS REVIEW OF ISSUES OF UTAH LAW ONLY

Life Investors ignores the standards governing this Court's grant of certiorari, as set forth in *Sup. Ct. R.* 10:

> **Rule 10.** *Considerations Governing Review on Certiorari*
>
> Review on a writ of certiorari is not a matter of right, but of *judicial discretion*. A petition for a writ of certiorari will be granted only for *compelling reasons*. The following, although neither controlling nor fully measuring the Court's discretion, indicate the *character of the reasons the Court considers*:
>
> > (a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an *important federal question* in

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5. Respondent Steven Johnson is the beneficiary under the insurance policy. Respondent Lajuan Johnson is the personal representative of Mr. Johnston's estate. (Opinion, App. 1 to Petition, p. 3a.)

> a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an *important federal question* in a way that conflicts with relevant decisions of this Court.
>
> (c) a state court or a United States court of appeals has decided an *important question of federal law* that has not been, but should be settled by this Court, or has decided an *important federal question* in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

(Emphasis added.) Thus, this Court grants certiorari primarily to consider "important federal questions."

Life Investors does not suggest why this Court should have any interest in reviewing a decision by the Tenth Circuit interpreting purely Utah law, particularly where, as discussed below, the Tenth Circuit's decision was based upon, and is consistent with, decisions of the Utah Supreme Court.

II. THE TENTH CIRCUIT CORRECTLY INTERPRETED UTAH LAW ON THE INSURANCE COVERAGE AND ATTORNEY FEE ISSUES.

Life Investors denied coverage under the policy because Mr. Johnson had a pre-existing illness, myotonic dystrophy, which Life Investors contends caused or contributed to the accident. However, based on the terms of the policy and as a matter of Utah law, the Tenth Circuit correctly ruled that the cause of the *accident* is irrelevant to coverage. Instead, the only issue relevant to coverage is the cause of the *injury* and *loss*, i.e., the broken neck, hospitalization and death. Because it is undisputed that the sole cause of Mr. Johnson's broken neck, hospitalization and death was the accident, not myotonic dystrophy, he was covered under the policy.

The Tenth Circuit was also correct in ruling that under Utah law respondents are entitled to recover attorney fees for Life Investors' breach of the express terms of the policy. In *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461 (Utah 1996), the Utah Supreme Court held that the insured under a first party insurance contract is entitled to attorney fees as consequential damages for breach of the express terms of the contract, if such fees were reasonably foreseeable at the time the contract was made. Life Investors does not dispute that it was reasonably foreseeable at the time the policy was issued that if Life Investors denied a claim, the beneficiary would incur attorney fees in litigating the claim.

Instead, Life Investors argues that other Utah appellate court decisions cast doubt on whether *Billings* is good law. However, none of the cases Life Investors relies upon even address the above holding in *Billings*, which is good law in Utah, and was also followed by the Tenth Circuit on the first appeal in this case.

A. Insurance Coverage

1. The Policy Language

Life Investors denied coverage under the accidental death and hospital benefit policy, based on the allegation that myotonic dystrophy caused or contributed to Mr. Johnson's accident. However, the relevant provisions of the policy, quoted above, do not address the cause of the accident; they only address the cause of the "loss" or the "injury."

"Injury" is a defined term under the policy. It means "bodily injury" occurring where three conditions are met. First, the "bodily injury" must have been "caused by an accident" occurring while coverage was in effect. (Aplt. App. 136) Here, it is undisputed that Mr. Johnson suffered "bodily injury," i.e., a broken neck (unlike the heart attack cases discussed below), as a result of his accidental fall backward down the stairs at his home, while covered under the policy.

Second, the "bodily injury" must result in "loss insured by the Policy." (*Id.*) Although "loss" is not a defined term in the policy, in light of the benefits provided it can only mean death and/or hospitalization.[6] This interpretation is also supported by a dictionary definition of the term "loss," as used in the insurance context: "the amount of an insured's financial detriment by death or damage that the insurer becomes liable for." *Webster's New Collegiate Dictionary*, p. 681 (G&C Merriam Co. 1977) Here,

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6. Because the policy fails to define "loss," or to address the cause of an accident, it is ambiguous and must be construed against Life Investors. *See*, *Utah Farm Bureau Ins. Co. v. Crook*, 980 P.2d 685, 686-687 (Utah 1999) (An insurance policy is ambiguous if ". . . it is unclear, omits terms, has multiple meanings or is not plain to a person of ordinary intelligence.")

it is also undisputed that Mr. Johnson was hospitalized and later died because of the accidental "bodily injury."

Third, the "loss" (i.e., hospitalization and death) must be "due, directly and independently of all other causes, to such accidental bodily injury." (Aplt. App. 136) This is the language upon which Life Investors hangs its hat in denying coverage, arguing that myotonic dystrophy caused or contributed to the "loss." However, even if myotonic dystrophy caused or contributed to the accident, i.e., the fall down the stairs (which plaintiffs dispute), it did not cause the "loss," i.e., the hospitalization and death.

Mr. Johnson's hospitalization and death had nothing to do with myotonic dystrophy. They were caused solely by his accidental fall backward down the stairs. The accidental "bodily injury" caused the "loss," and the cause of the accident is simply irrelevant.

Life Investors also relies on the above quoted policy exclusion, which excludes "loss resulting from an Injury caused or contributed to by, or as a consequence of . . . 3. any sickness or infirmity unless the treatment of such is required as the direct result of an accidental bodily injury . . ." (Aplt. App. 139) Again, however, myotonic dystrophy did not cause or contribute to the "Injury" here, i.e., the broken neck and resulting "loss." Moreover it does not aid Life Investors that pneumonia was the immediate cause of death, because it is undisputed that "the treatment of such [was] required as the direct result of an accidental bodily injury" (*Id.*), so that this exclusion indisputably does not apply to the pneumonia.

Also, one cannot equate the cause of the "injury" or "loss" with the cause of the "accident." These words are not

synonymous. One may have an "accident," such as a fall, without suffering "injury." Also, one may suffer a minor "injury" from an accidental fall without incurring a "loss" (here, hospitalization and death). The Life Investors' exclusion based on the cause of the "injury" or "loss" simply does not exclude coverage based on the cause of the "accident."

If Life Investors wanted to exclude coverage where sickness is the cause of the "accident," rather than the cause of the "loss" or "injury," it easily could have done so in the policy, as the Tenth Circuit ruled (Opinion, App. 1 to Petition, p. 9a), and as was done in cases discussed below. Not having excluded coverage where sickness is the cause of the accident, the plain language of the policy provides coverage here. As will be shown below, and as the Tenth Circuit correctly ruled (Opinion, App 1 to Petition, pp. 7a-10a), the foregoing policy interpretation is also supported by Utah case law.

2. Utah Case Law

Browning v. Equitable Life Assur. Soc., 72 P.2d 1060 (Utah 1937) ("*Browning I*"), *rehearing den.*, 80 P.2d 348 (1938) ("*Browning II*"), involved a disability claim under an accident policy.[7] The insured accidentally sprained the index finger on his right hand. Apparently, the sprain activated a previously latent condition in the insured (referred to by the court as toxemia), resulting in arthritis in the finger. The policy, similar to the Life Investors policy here, insured ". . . against loss resulting directly and independently of all other causes, from bodily injuries effected . . . solely through external, violent and accidental means . . ." 72 P.2d at 1073.

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7. In the Petition, Life Investors inexplicably does not address *Browning I*, *Browning II*, or any other Utah case law on the Utah law issue of insurance coverage.

In the concurring opinion of Justice Larson in *Browning I*, which was the majority opinion on the interpretation of the above language, the court held that the insured's arthritis was a covered disability under the policy. Among other things, the court stated as follows with respect to the above quoted policy language:

> A sick man may be the subject of an accident *which would not have befallen him but for his sickness*. One may meet his death by falling into a place of danger *in a faint or in a fit of epilepsy. But [such] an event has usually been held to be the result of an accident, not of disease*. In Manufacturers' Acc. Indem. Co. v. Dorgan, 58 F. 945, 954, 7 C.C.A. 581, 22 L.R.A. 620, it was said by Mr. Justice Taft: "If the deceased suffered death by drowning, *no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death*, unless it appeared that death would have been the result, even had there been no water at hand to fall into. *The disease would be but the condition; the drowning would be the moving, sole, and proximate cause*." See, also, Winspear v. Acc. Ins. Co., 6 Q.B.Div. 42; Ludwig v. Preferred Acc. Ins. Co., 113 Minn. 510, 130 N.W. 5; Preferred Acc. Ins. Co. v. Muir, 126 F. 926, 61 C.C.A. 456.

72 P.2d at 1076 (emphasis added).

Justice Wolfe, writing for the majority on other issues but as a dissenter on this issue, agreed with the above quoted analysis by Justice Larson:

> It is possible to divide the cases where an accident and another cause other than the accident both have their influence on the disability or death into the following categories:
>
> 1. Where the accident itself is caused by a pathological condition. Thus, where a dizzy spell causes a person to fall and fracture his skull. Without discussion or commitment on this class of cases, it would seem to the writer that they would be compensable under the language of the policy *because the chain of cause and effect should start from and not before the injury.* Any reason why the accident happened, whether carelessness, weak physical condition, or from unavoidability must be ruled out. *The causal chain begins from the point of injury.*

72 P.2d at 1070 (citation omitted, emphasis added).

The above quoted unanimous analysis in both the *Browning I* majority and dissent supports respondents' preceding argument that based on the policy language here, similar to the above quoted policy language in *Browning I*, if the loss is caused by an accident, the accident policy provides coverage, regardless of the cause of the accident.[8]

8. More recent cases from other jurisdictions, including Montana, Michigan, Texas and Oregon also agree that the cause of an accident is irrelevant to coverage under an accident policy containing coverage (Cont'd)

Before the Tenth Circuit, Life Investors argued that *Browning I* applied the efficient proximate cause doctrine and that under *Alf v. State Farm Fire and Cas. Co.*, 850 P.2d 1272 (Utah 1993), parties can contract this doctrine away. However, *Browning I* did not apply the efficient proximate cause doctrine, and, here, Life Investors contracted away any basis for excluding coverage based on the cause of the accident.

In *Alf*, the main water line to plaintiffs' home froze and burst. Large volumes of water escaped causing soil subsidence, resulting in extensive damage to several structures on the property. Although the burst water pipe was covered under plaintiffs' homeowner's policy, damage from earth movement was excluded, ". . . regardless of . . . the cause of the excluded event. . . ." 850 P.2d at 1273, n. 1 (quoting the policy). Based on this exclusion, the court affirmed the denial of coverage.

Among other things, plaintiffs argued that the efficient proximate cause doctrine required coverage. Under this doctrine, a cause that sets other intervening causes in motion is deemed to be the efficient proximate cause of the loss, rather than the intervening causes. *Id.* at 1277. The court held that the parties contracted away this doctrine under the above quoted policy language. *Id.* at 1277-1278.

Browning I did not apply the efficient proximate cause doctrine. Instead, as shown above, it declined to look backward

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(Cont'd)

provisions and exclusions similar to those at issue in the Life Investors' policy. *See*, *Pond v. North American Life & Cas. Co.*, 697 P.2d 1360, 1361-1362 (Mont. 1985); *Wells v. Prudential Ins. Co. of America*, 142 N.W. 2d 57, 58-59, 61 (Mich. App. 1966); *Nat. Life & Accident Ins. Co. v. Franklin*, 506 S.W. 2d 765, 766-768 (Tex. App. 1974); *Salisbury v. John Hancock Mut. Life Ins. Co.*, 486 P.2d 1279 (Or. 1971).

from the accident to determine the accident's cause (the cause of a cause). Similarly, it is Life Investors, not plaintiffs here, that seeks to apply the efficient proximate cause doctrine, by arguing that myotonic dystrophy was the cause of the accident. However, Life Investors, not plaintiffs, contracted away that doctrine by the very language of its own policy, which failed to exclude coverage based on the cause of the accident, as further shown by *Browning II*.[9]

On rehearing in *Browning II*, the defendant insurer raised, apparently for the first time, an exclusion in the accident policy that, unlike here, *expressly excluded coverage where the accident is caused by an illness*. The exclusion stated as follows:

> The insurance . . . shall not cover *accident*, injury, disability, death or other loss *caused* directly or indirectly, wholly or partly, by bodily or mental infirmity . . . or by any other kind of disease . . .

80 P.2d at 351 (first emphasis added, second emphasis in original).

In addressing this exclusion, the court correctly stated as follows:

> This provision of the policy means, therefore, that there is excepted from the insurance . . . injury or loss resulting from an accident or injury, where such *accident or injury* was caused, brought about, or induced, directly or indirectly by disease, [or] bodily

9. A quote in *Alf* from George Couch, *Cyclopedia of Insurance Law* (2d rev. ed. 1983) also does not benefit Life Investors because it talks about an exclusion where ". . . disease contributed to the death" (850 P.2d at 1278, quoting Couch), not where disease allegedly contributed to the accident.

> or mental infirmity . . . Thus it seeks to safeguard the company from such cases as where one subject to fits, falling from a fit sustains an injury from the fall . . .

Id. at 352 (emphasis in original).

Here, the Life Investors policy has *no* language excluding coverage based on the cause of the "accident." Thus, the above quoted language from the *Browning II* decision has no application here. If Life Investors wanted to exclude coverage based on the cause of the "accident," it could have and should have done so, as the insurer did in *Browning*. Because Life Investors did not do so, the cause of the accident is irrelevant.[10]

In *Whitlock v. Old American Insurance Co.*, 442 P.2d 26 (Utah 1968) the insured under an accident policy died following an auto accident. Prior to the accident the insured was diagnosed with cancer. The insurer denied coverage, contending, among other things, that the insured's weakened condition caused by the cancer contributed to his death. At issue was the following policy exclusion:

> This policy does not cover any loss or disability resulting directly or indirectly, in whole or in part, from (a) any mental or bodily sickness or disease.
>
> * * *

Id. at 27.

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10. Moreover, in the *Browning II* opinion, the court declined to change its decision that the insured's disability was covered by the accident policy, notwithstanding the policy exclusion.

In rejecting the insurer's contention, the court stated as follows:

> The defendant's argument seems to amount to this: Even though a person insured under an accident policy dies following an injury suffered in an accident, if he had any diseased condition which in any degree contributed in causing his death, in that a more robust person would not have died from the injury, recovery is prevented by the exception in its policy. *If this narrow restriction were accepted and followed to its logical conclusion it would in practical effect substantially cut away accident insurance coverage for people over middle age. A high percentage of them have some frailty or affliction from which they would die eventually and because of which an injury might more readily result in death than it would to a person not so afflicted. If this would prevent recovery under an accident policy the insurance sold to cover accidents would be but an illusion and acceptance of the premiums a fraud.*

Id. at 27-28 (emphasis added)

A similar analysis applies to Life Investors' arguments here. Life Investors argues that Mr. Johnson's myotonic dystrophy made him more susceptible to falling than the average person. Mr. Johnson was in his sixties at the time of the accident. An insured that age or older is likely to have one or more ailments making him or her more susceptible to accidents than a younger person.

Under Life Investors' theory, the insurer could almost always successfully deny coverage under an accident policy, to

an older insured who has an accident, by pointing to one or more pre-existing ailments as factors contributing to the accident. If insurers are allowed to get away with such an approach, based on unclear policy language as to what is covered and what is excluded, the effect would be to deprive the insureds of all benefits of an accident policy, once they reach a certain age.

Before the Tenth Circuit, Life Investors also pointed to other language in *Whitlock* which Life Investors claims supports its position. Addressing *Browning II*, *Whitlock* stated as follows:

> In the decision on rehearing, Justice Larson speaking for the court quoted with approval from Thornton v. Travelers' Ins. Co., 116 Ga. 121, 42 S.E. 287, 94 Am.St.Rep. 99, wherein it was pointed out that if the diseased condition of the insured did not *contribute in bringing about the accident* and injury, but merely aggravated the consequences of it, the plaintiff was entitled to recover.

442 P.2d at 28 (emphasis in original)

However, as indicated above, *Browning II* was addressing a policy exclusion, unlike the exclusion here, which expressly excluded coverage where illness contributed to the *accident*. *Whitlock* is correct that in addressing this exclusion, *Browning II* did cite the *Thornton* case with approval. However what *Whitlock* fails to point out is that, as noted in *Browning II*, the accident policy in *Thornton* also had an express exclusion where illness (a hernia) contributed to the accident:

> In Thornton v. Travelers' Insur. Co., 116 Ga. 121, 42 S.E. 287, 94 Am.St.Rep. 99, it is said (page 288):

> "The policy contained a stipulation in the following language: 'This insurance shall not cover * * * *accident*, nor injuries, nor disability, nor death, nor loss of limb or sight, *resulting wholly or partly, directly or indirectly,* * * * *from hernia*.'"

Browning II, 80 P.2d at 352, quoting *Thornton*, 42 S.E. at 288 (emphasis added)

Thus, the above statement in *Whitlock* about accidents caused by illness being excluded under an accident policy only applies where, as in *Browning* and *Thornton* and unlike here, the policy expressly excludes coverage if illness contributes to the "accident." Accordingly, the following statement made later in *Whitlock*: "The important fact is that his diseased condition has no causative relation to the accident" (442 P.2d at 29), must also be construed as applying only where, unlike here, there is an express contractual exclusion for accidents caused by illness.

The case Life Investors primarily relied upon in the Tenth Circuit is *Winchester v. Prudential Life Ins. Co. of America*, 975 F.2d 1479 (10th Cir. 1992), a Tenth Circuit case applying Utah law. However, *Winchester* was a heart attack case (pre-existing heart disease resulting in heart attack allegedly brought on by physical exertion) as was a Utah case *Winchester* partially relied on, *Elton v. Bankers Life & Cas. Co.* 516 P.2d 165 (Utah 1973) (pre-existing heart disease resulting in heart attack allegedly brought on by stress). However, for a variety of reasons discussed in both *Winchester* and *Elton*, under Utah law, heart attacks are typically not covered by accident policies. Falls, like Mr. Johnson's here, are covered.

Winchester is factually and legally distinguishable from the present case. *Winchester* was an ERISA case in which the court

reviewed the plan administrator's decision denying coverage under the accident policy, according to an arbitrary and capricious standard of review. 975 F.2d at 1483. No such deferential standard of review applies here.

Also, after discussing *Elton* and other Utah cases, *Winchester* ruled that under Utah law a heart attack did not constitute "bodily injury" within the meaning of the policy, because there had been no external violence or physical impact to the insured. *Id.* at 1486. Here, of course, the external violence and physical impact to Mr. Johnson from the fall backward down the stairs were severe enough to fracture his neck, ultimately resulting in death.

Once *Winchester* determined that the insured had not suffered "bodily injury," the court needed to go no further to reach its decision affirming the denial of coverage. However, in non-binding dictum, *Winchester* went on to interpret policy language similar to that present here.

As here, the accident policy in *Winchester* had both a limitation on coverage as well as an exclusion. The court described the limitation on coverage as follows:

> Specifically, the policy conditioned accidental death coverage on "[t]he [e]mployee [having] sustained an accidental bodily injury," and "[t]he injury, directly and independently of all other causes, [having] resulted in the *loss*."

975 F.2d at 1482-1483 (emphasis added) The exclusion stated that:

> "[a]ny *loss* which results . . . directly or indirectly from bodily or mental infirmity or disease." is "not covered."

Id. at 1487 (emphasis added).

The court interpreted these provisions as follows:

> We finally consider whether "[t]he injury, directly and *independently of all other causes*, resulted in the *loss* [emphasis added]." The policy thus makes clear that this provision excludes losses resulting even in part from pre-existing conditions. This theme is echoed in the exclusions . . . Thus, if Mr. Winchester did have a pre-existing infirmity, such as a heart condition, then his *death* did not result "directly and independently of all other causes."

Id. (first emphasis in original, remaining emphasis added). However, this interpretation (even if not dictum) is simply not dispositive of the issue presently before this Court.

The *Winchester* interpretation does little more than restate the policy language, i.e., if a pre-existing condition contributes to the "loss," i.e., "death" there is no coverage. *Winchester* simply does not address the issue present here, whether there is coverage when the pre-existing condition is not alleged to have contributed to the "loss" or "death," but to the *accident* that caused the death.

In *Winchester* (and *Elton*) the insured died of heart disease culminating in a fatal heart attack. Here Mr. Johnson died not as the result of myotonic dystrophy or any resulting medical condition, but as the result of a fall to which this disease allegedly contributed.

Thus, *Winchester* does not control here; *Browning* does. Under *Browning*, absent a policy limitation or exclusion expressly addressing the cause of the *accident*, as opposed to the cause of the *injury* or *loss*, the cause of the accident is

irrelevant to coverage, as is the case here.[11] Further, under *Whitlock*, alleged pre-existing conditions cannot be used as a pretext to avoid accident policy coverage of older insureds who die of accidents, such as Mr. Johnson.

B. Attorney Fees

In *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461 (Utah 1996), the Utah Supreme Court held that the insured under a first party insurance contract, such as the Life Investors' policy here, can recover attorney fees as consequential damages for breach of the express terms of the contract: "Attorney fees may be recoverable as consequential damages flowing from an insurer's breach of *either* the *express* or the implied terms of an insurance contract." (*Id.* at 468, emphasis added) Fees are recoverable if they were reasonably foreseeable at the time the contract was made. *Id.*

Here, Life Investors does not dispute that it was reasonably foreseeable at the time the insurance policy was issued, that if the insurer denied a claim, the beneficiaries would incur attorney fees in litigating the claim. Instead, Life Investors argues that *Billings* is not good law on this issue, in light of two more recent Utah Supreme Court decisions, *Gibbs M. Smith , Inc. v. U.S.*

11. Life Investors was also wrong in arguing to the Tenth Circuit that respondents have the burden of proof, which is a state law issue in a diversity case. *See, Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1172, n. 11 (10th Cir. 1981), *cert. den.*, 464 U.S. 824 (1983). Even under Life Investors' interpretation of the policy, once respondents showed that the fall caused Mr. Johnson's death, under Utah law Life Investors had the burden of proving the cause of the fall. *See*, *Hassing v. Mut. Life Ins. Co. of New York*, 159 P.2d 117, 120 (Utah 1945). Also, the death certificate, discussed above, may be rebutted by other evidence (*Whitlock, supra*, 442 P.2d at 27), which respondents have done, as shown in the above Statement of the Case.

Fidelity & Guaranty, Co., 949 P.2d 337 (Utah 1997); and *Lieber v. ITT Hartford Ins. Center, Inc.*, 15 P.3d 1030 (Utah 2000). However, neither of these cases undermines the above holding in *Billings*.[12]

Smith [and *Campbell v. State Farm Mut. Auto Ins. Co.*, 65 P.3d 1134 (Utah 2001), *rev'd. on other grounds*, 155 L Ed. 2d 585 (2003), cited by Life Investors before the Tenth Circuit] are distinguishable because they involved a claim by the insured against its insurer based on denial of third party liability coverage, rather than first party coverage, although the court in *Smith* referred to the claim as "a first-party action for third-party coverage." 949 P.2d at 344. In *Lieber*, plaintiff sought coverage under its employer's uninsured motorist coverage, which the court characterized as first party coverage. In all three cases, the court indicated that the insured was entitled to attorney fees if the insurer breached the implied covenant of good faith and fair dealing. However, none of these cases addressed the holding in *Billings* that an insurer is also liable for fees as consequential damages for breach of the express terms of a first party insurance contract.

It is unclear why *Smith*, *Lieber*, and *Campbell* failed to address the above holding in *Billings*. Perhaps the court in *Smith* felt that this holding did not apply to third party insurance coverage. The court in *Campbell* merely affirmed the entitlement to attorney fees for breach of the implied covenant of good faith, and had no reason to consider the issue of entitlement to fees for breach of the express terms of the contract. Also it may be

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12. All the other Utah cases Life Investors cites in the Petition on this issue predate *Billings*, except for the Utah Court of Appeals (the lower level appellate court in Utah) decision in *Pugh v. North American Warranty Services, Inc*, 1 P.3d 570 (Utah App. 2000).

that the respective insureds in the three cases did not raise the issue. One can only speculate.

What is not speculative is that (1) under *Billings*, respondents here are entitled to attorney fees as consequential damages because Life Investors breached the express terms of its first party insurance contract, and (2) nothing in *Smith*, *Lieber*, or *Campbell* purports to overrule, criticize, limit, distinguish or in any other way undercut this clear holding in *Billings*. There is simply silence on the issue in these three cases, which cannot be construed one way or the other.

Moreover, Life Investors ignores the fact that the Tenth Circuit acknowledged the continuing validity of the above holding in *Billings*, in the prior appeal *in this case*.[13] The Tenth Circuit ruled in its July 11, 2000 Order and Judgment (App. 4 to Petition, pp. 43a-45a) that under *Billings*, the insured is entitled to recover attorney fees as consequential damages for breach of either the express terms of a first party insurance contract, or the implied covenant of good faith and fair dealing.

Life Investors also argues that the ruling at issue in *Billings* was dictum and should not be followed for policy reasons. However, this ruling was not dictum, because, as the Tenth Circuit noted in its present Opinion, the jury had found that the insurer breached both the express terms of the insurance contract and the implied covenant of good faith and fair dealing. Also, *Billings* noted that there are at least two other types of contracts, the breach of which could result in an award of attorney fees as consequential damages under Utah law. 918 P.2d at 468.

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13. The decision in the prior appeal was issued *after Smith* was decided, but before *Lieber* and *Campbell*.

In addition, and as the Tenth Circuit also discussed, the dissent in *Billings* did not characterize the ruling at issue as dictum, and instead criticized it, making the same policy arguments as Life Investors now makes. The majority opinion obviously considered and rejected these arguments, and it is the majority opinion in *Billings* that is binding as to issues of Utah law, not the dissent.

Thus, it is clear that the Tenth Circuit was correct in ruling that *Billings* remains good law in Utah, on entitlement to attorney fees as consequential damages for breach of the express terms of a first party insurance contract.[14] (Opinion, App 1 to Petition, pp. 10a-11a)

CONCLUSION

Based upon the foregoing, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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14. Even if *Billings* offered only dicta on this issue, the Tenth Circuit further held that "considered dicta by the state's highest 'court'" is important for the federal courts to use in predicting how the highest state court may rule (Opinion, App 1 to Petition, p. 11a.)